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2009 DEC -7 PM 2: 26

BEFORE THE FEDERAL ELECTION COMMISSION

2009 DEC -7 P 2: 52

In the Matter of

National Right to Life Political Action Committee
and Carol Tobias, in her official capacity as treasurer

MUR 6133

SENSITIVE

DEC 15 2009

GENERAL COUNSEL'S REPORT # 3

EXECUTIVE SESSION

I. ACTIONS RECOMMENDED

Find probable cause to believe that National Right to Life Political Action Committee
and Carol Tobias, in her official capacity as treasurer, ("Respondents") violated 2 U.S.C.

§ 434(g)

**II. THERE IS PROBABLE CAUSE TO BELIEVE THAT RESPONDENTS
VIOLATED 2 U.S.C. § 437(g)**

A. Background

The Federal Election Campaign Act of 1971, as amended ("the Act"), provides that the
Commission must receive a political committee's reports of independent expenditures within 24
or 48 hours, whichever is applicable. 2 U.S.C. § 434(g). Any independent expenditures
aggregating \$1,000 or more, with respect to any given election, and made after the 20th day but
more than 24 hours before the day of an election must be reported and the report must be
received by the Commission within 24 hours after the expenditure is made. 2 U.S.C.
§ 434(g)(1)(A). A notice is thereafter required within 24 hours after each independent
expenditure aggregating an additional \$1,000 with respect to the same election as that to which
the initial report relates. 2 U.S.C. § 434(g)(1)(B). Any independent expenditure aggregating
\$10,000 or more with respect to any given election, at any time during a calendar year, up to and

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1 including the 20th day before an election, must be disclosed within 48 hours each time that the
2 expenditures aggregate \$10,000 or more. 2 U.S.C. § 434(g)(2).

3 The Commission's post-BCRA regulations at 11 C.F.R. §§ 104.4 and 109.10, effective as
4 of February 3, 2003, state that political committees must ensure that the Commission receives
5 independent expenditure reports by 11:59 p.m. Eastern Standard Daylight Time on the second
6 day (for 48-Hour Notices) or the next day (for 24-Hour Notices) "following the date on which
7 the communication that constitutes an independent expenditure is publicly distributed or
8 otherwise publicly disseminated." 11 C.F.R. §§ 104.4(b), (c) and 109.10(c) and (d). The same
9 applies for each subsequent independent expenditure aggregating above either the \$1,000 (for
10 24-Hour Notices) or \$10,000 (for 48-Hour Notices) threshold. *Id.* The regulations specify that
11 the aggregation threshold date is "as of the first date on which a communication that constitutes
12 an independent expenditure is publicly distributed or otherwise publicly disseminated, and of the
13 date that any such communication with respect to the same election is subsequently publicly
14 distributed or otherwise publicly disseminated." 11 C.F.R. § 104.4(f). The Commission first
15 clarified that "an independent expenditure is made on the first date on which the communication
16 is published, broadcast, or otherwise publicly disseminated," before the BCRA rules' effective
17 date, and several months before the start of the 2004 election cycle. *See* Explanation and
18 Justification for Independent Expenditure Reporting, 67 Fed. Reg. 12834, 12837-38 (March 20,
19 2002); the clarifying rule at section 109.1(f) became effective as of June 13, 2002. 67 Fed. Reg.
20 40586 (June 13, 2002).

21 Respondents have been making independent expenditures since 1980. Probable Cause
22 Hearing Transcript ("Transcript") at 24. The vast majority of the money Respondents raise is
23 used to make independent expenditures. *Id.* at 25. FEC disclosure reports show that in the 2004

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1 election cycle, Respondents made in excess of \$3.7 million in independent expenditures. By the
2 start of the 2004 election cycle, Respondents' treasurer had served in that capacity for at least 10
3 years.¹

4 As set forth in the General Counsel's Brief, incorporated herein by reference,
5 Respondents failed to file or untimely filed 24- or 48-Hour Notices for at least one hundred and
6 thirty independent expenditures during the 2004 election cycle, involving a total aggregate
7 amount of \$1,660,708. General Counsel's Brief at 1-2. In their Reply Brief, Respondents do not
8 dispute this violation. They maintain, however, that the treasurer repeatedly made a "single
9 error"—mistakenly thinking that the trigger date for 24-Hour and 48-Hour Notices was the date
10 of payment—that was understandable because the available Commission guidance on reporting
11 independent expenditures was unclear. Reply Brief at 2. Respondents requested a probable
12 cause hearing on these contentions, as well as others relating to the appropriate level of any civil
13 penalty. Reply Brief at 6. The Commission granted the request and held a hearing on
14 November 4, 2009.

15 At the hearing, Respondents conceded that they did not comply with the requirements for
16 timely filing notices for 130 independent expenditures. *See* Transcript at 7 ("Certainly we have
17 conceded that there were late reports filed by the National Right to Life PAC during the 2003-
18 2004 election cycle"); 9 ("we had the interesting situation. . . of [Respondents] filing 24-and 48-

¹ At the probable cause hearing, Respondents' counsel was unsure which of two treasurers was in place during the 2004 election cycle, and for how long, but agreed to supplement the record. Transcript at 36, 58. In their letter dated November 12, 2009, supplementing the probable cause hearing record, Respondents stated that Amarie Natividad was appointed treasurer in 1994 and served until 2008. However, disclosure reports on the website go back to 1993, and Ms. Natividad appears as treasurer on Respondents' 1993 disclosure reports. According to the Reports Analysis Division ("RAD"), Respondents' Form 1 shows that Ms. Natividad first became treasurer on July 31, 1991.

1 hour reports regarding independent expenditures done in primaries and the general election after
2 those elections have already occurred"); and 15 ("single error resulted in 130 reports being
3 filed late"). Respondents acknowledged that "the trigger date for a report is when you distribute
4 publicly distributed communications . . . assuming you have spent the applicable amount," and
5 that "the reporting requirement has justification." Transcript at 7, 60.

6 While conceding the violation, Respondents maintain that the Commission should
7 consider the following arguments in resolving this matter: (1) Respondents made a single error,
8 albeit 130 times—mistakenly believing that the trigger date for reporting independent
9 expenditures was the payment date; (2) that error was justifiable as the Commission's guidance
10 to the "laity" was unclear; and (3) the Commission sent no RFAI's to Respondents questioning
11 their 2004 election cycle reporting of independent expenditures. See Transcript at 7-17. As
12 discussed in more detail below, none of these arguments provide grounds for action other than a
13 finding of probable cause to believe Respondents violated 2 U.S.C. § 434(g). We discuss each in
14 turn.

15 **B. Single Error**

16 From the beginning of this matter, Respondents attributed their failure to file or timely
17 file 24- and 48-Hour Notices to a "single error"—a mistaken belief that the notice reporting date
18 was triggered by the payment, rather than the distribution or dissemination date—and maintained
19 that under this erroneous belief, Respondents filed all, or almost all, notices "timely." See
20 Response Brief at 1; Exhibit 1 to Response Brief (Letter dated January 24, 2009) at 3. To
21 illustrate their contention, Respondents presented a chart of 13 notices that were timely filed
22 based on the date of payment. Exhibit 1 to Response Brief at 3-4.

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1 At the probable cause hearing, Respondents reiterated the "single error" theory and the
2 position that all of Respondents' notices were timely if the date of payment, rather than the
3 date of distribution or dissemination, was the trigger. Transcript at 7, 15, 35, 45. When
4 informed by the General Counsel that the evidentiary record did not corroborate that
5 understanding, Respondents agreed to review the facts and supplement the record. Transcript at
6 30-34.

7 Respondents' post-hearing supplemental submission shows that some of their errors
8 resulting in no, or late, notices of independent expenditures during the 2004 election cycle were
9 based on a lack of awareness of the filing requirements and not on a misunderstanding of the
10 trigger date for filing notices. Specifically, Respondents admitted for the first time that for
11 \$671,106.97 of independent expenditures with payment dates on October 1, 2004, "no 48 hour
12 notices were filed at all, except in response to RFAI's, because staff was not aware of the 48 hour
13 reporting requirement for independent expenditures." November 12, 2009 letter at 3. Respondents
14 provided no explanation for why they were not aware of the requirement to file 48-Hour notices of
15 independent expenditures, although every piece of available guidance referenced this requirement.
16 Moreover, Respondents did not mention, or provide any explanation for, their failure to file
17 Notices before the 2004 general election for an additional 87 independent expenditures totaling
18 \$401,355.64, disclosed on the same report as the \$671,106.97, with payment dates of October 4, 8,
19 and 13, 2004, respectively.² See Committee's 2004 12 Day Pre-General Report.

20 Additionally, Respondents admitted that even some 24-Hour notices were not timely filed
21 under their mistaken theory of the trigger date for reporting, because they erroneously believed that

² Our calculation of the \$1,660,708 amount in violation includes many, but not all, of the \$401,355.64 figure. We did not include all of this figure in our initial calculations—which were made before the post RTB responses of the Committee—based on the lack of dissemination date information, and given that the amounts of each given independent expenditure did not exceed \$10,000.

1 the 24-Hour Notice period did not include Saturdays and Sundays. November 12, 2009 letter at 2.
2 Again, Respondents provided no explanation for that erroneous belief. Finally, Respondents
3 acknowledged that they did not originally file any 24-Hour Notices for independent expenditure
4 communications that were disseminated before the election but paid for after the election because
5 the payment dates were not within the 24-Hour reporting period. *Id.* Thus, Respondents' original
6 explanation that a single error—using the wrong trigger date for reporting independent
7 expenditures—was the sole reason for the non-filing or untimely filing of notices, is not supported
8 by the facts. Rather, it appears that Respondents made wholesale errors inconsistent with the law
9 in failing to file, or untimely filing, 24- and 48-Hour Notices of independent expenditures during
10 the 2004 election cycle.³

11 **C. Lack of Available Clear Guidance**

12 Respondents also maintained from the start that their mistaken belief that independent
13 expenditure notice filing was based on the date of payment was justifiable, given their claim that
14 the guidance available to them during the 2004 election cycle was unclear to the “laity.” The
15 “laity,” in Respondents' view, includes everyone but the Commissioners, Commission and OGC
16 staff, and election law lawyers. Reply Brief at 5. We explained in the General Counsel's Brief
17 that the available guidance was clear, even for laypersons, although we disagreed that
18 Respondent's experienced treasurer should not be held to a higher standard of understanding the

³ The multiplicity of errors alone makes Respondents' reliance on the Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn (June 24, 2009) for MUR 5957 (Sekhon) inapposite. In any event, there is no comparison between the Sekhon circumstances involving a self-employed neophyte candidate who raised less than \$200,000, a regulation that “does not give rise to any independent recordkeeping or reporting requirements,” and the view that the errors may have been attributable to a software glitch, Statement of Reasons at 1, 9, and 15, to the Respondents' circumstances, involving a sophisticated organization with an experienced treasurer, whose primary activity is raising and spending millions of dollars for independent expenditures, and the Act and the applicable regulations that create specific reporting requirements with which Respondents failed to comply.

1 independent expenditure reporting requirements than laypersons with no responsibilities for
2 accurate and timely disclosure. General Counsel's Brief at 3-6.

3 At the probable cause hearing, Respondents' counsel clarified that Respondents do not
4 claim reliance on any particular guidance that they read and found unclear, but only on the
5 general proposition that the guidance, particularly the guidance prepared for the "laity," such as
6 campaign guides and the Record, was inadequate. Transcript at 9-11. Respondents' chief
7 complaint is that publications aimed at the public such as the Record, in explaining the laws
8 applicable to independent expenditure reporting, used "legal terms of art," such as the words
9 "independent expenditure," which Respondents claim the "laity" interprets as a payment. Reply
10 Brief at 4; Transcript at 10-11. Indeed, concluding that the Commission itself was responsible
11 for misleading the Respondents in such publications, Respondents' counsel stated "you wonder
12 why it is that these publications to the general public would not have said the communication is
13 publicly distributed, because then people would have known what you were talking about."
14 Transcript at 12, 40.

15 In Exhibit 1 to their Reply Brief at 11, Respondents state that the 2007 campaign guide
16 "is the first time we see the key language clearly written, saying the 'date that a communication
17 is publicly disseminated serves as the date that an SSF must use to determine whether the
18 . . . independent expenditure has . . . reached or exceeded the threshold reporting amount[] . . .'
19 *[b]ut this language from the 2007 guide was not available to NRLPAC or its treasurer in 2003-*
20 *04.*" (Emphasis in original). See also Transcript at 13 (2007 guide, "not available of course in
21 2003 and 2004," states that the date that a communication is publicly disseminated serves as the
22 date for determining whether the threshold reporting amount has been reached).

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1 Respondents' view that the 2007 guidance referenced above was not available during the
2 2004 election cycle is incorrect. Indeed, the regulations themselves use the terminology
3 "communication that constitutes the independent expenditure." See General Counsel's Brief at 3-
4 4. Further, nearly the very same verbiage that Respondents describe as the "key language clearly
5 written" in 2007 appeared in the discussions of independent expenditure reporting in both the
6 January 2003 Record (at 15) and in the Record's January 2003 BCRA Campaign Guide
7 Supplement (at 20). Both state: "The date that a communication is publicly disseminated serves
8 as the date that a person or committee must use to determine whether the total amount of
9 independent expenditures has, in the aggregate, exceeded the threshold reporting amounts of
10 \$1,000 or \$10,000."⁴ These are exactly the types of documents Respondents claim are aimed at
11 "the laity."⁵

12 Moreover, January 2003, the start of the 2004 election cycle, was not the first time the
13 Record reported the Commission's clarification of the trigger date for reporting independent
14 expenditures, which it announced in a final rule in March 2002, and which became effective in
15 June 2002. In the May 2002 Record (at 2), the Commission advised that amendments to the Act
16 required 24-Hour Notices to be received by the Commission within 24 hours of when the
17 independent expenditure is made, and that the Commission's new regulations "clarify when an
18 independent expenditure is considered to be 'made.' Under the new rules, an independent
19 expenditure is 'made' on the first date that the communication—for instance a television ad or

⁴ Respondents cited to the one-page discussion of independent expenditures in the Record's January 2003 BCRA Campaign Guide Supplement in text accompanying footnote 32 to Exhibit 1 to their Reply Brief, and Respondents' counsel acknowledged at the probable cause hearing that he was aware that it included the language referencing the date of communication. Transcript at 63.

⁵ In the Record's January 2003 BCRA Campaign Guide Supplement (at 1), the Commission encouraged "readers to insert this supplement into their Campaign Guides and to consult it, along with the Guides, until the revised Guides are available to the public."

1 printed flyer—is published, broadcast, or otherwise publicly distributed.” Again, this is exactly
2 the kind of clear language in exactly the type of guidance that Respondents claim they needed in
3 order to report correctly. Thus, Respondents’ claim there was no clear guidance available to the
4 “laity” during the 2004 election cycle regarding when notices needed to be filed is simply
5 incorrect. Moreover, Respondents provided no explanation concerning their lack of awareness
6 that they were required to file 48-Hour Notices during the 2004 election cycle. Indeed, despite
7 Respondents’ contention that “the then treasurer reviewed the available information and
8 misunderstood the law,” Exhibit 1 to Reply Brief at 3, the ubiquitous references to the 48-Hour
9 filing period in the regulations, the Form and in Commission publications, which she apparently
10 missed completely, raises questions concerning the extent of her review.

11 **D. Absence of RFAI’s**

12 At the probable cause hearing, for the first time, Respondents contended that no one at
13 the Commission ever brought to their attention, specifically through RFAI’s, that they were
14 filing their 2004 election cycle independent expenditure notices late. Transcript at 16, 24, 28, 45,
15 57. According to Respondents’ counsel, “if anyone had raised the question, are you filing these
16 timely, that is the independent expenditure report, then [Respondents] would have immediately,
17 I’m sure, consulted with me and I would have told them that and then they would have changed
18 their practice immediately.” *Id.* at 57-58. The General Counsel advised counsel that contrary to
19 Respondents’ claim, Respondents had, in fact, received such RFAI’s. *Id.* at 56-57.

20 In their letter dated November 12, 2009, supplementing the probable cause hearing
21 record, Respondents acknowledge that the Commission sent RFAI’s on July 14, 2004 for the
22 amended 2004 April Quarterly Report, and on December 1, 2004 and June 3, 2005 for the
23 amended 2004 October Quarterly Report, respectively, stating that Schedule E “indicates that

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1 your Committee may have failed to file one or more of the required 48 hour notices for
2 independent expenditures." November 12, 2009 letter at 2. The July 14, 2004 RFAI is of
3 particular note because it not only advises the Committee of its apparent failure to file 48-Hour
4 Notices for prior independent expenditures, but it also served as additional guidance to the
5 Committee that such Notices would be required for such expenditures made after the July 14,
6 2004 date of the RFAI. Against this backdrop, the Committee's recent admission that it was
7 unaware of the 48-Hour Notice requirement is troubling. *See discussion supra* Section II.B. In
8 fact, in addition to the three RFAI's referenced by Respondents, there were five other RFAI's
9 sent to Respondents based on 2004 election cycle reports regarding possible problems with the
10 timeliness of their independent expenditure notices. The other five were sent on: (1) November
11 17, 2004 for the amended 2004 July Quarterly Report (48-Hour Notices); (2) December 1, 2004
12 for the 2004 October Quarterly Report (48-Hour Notices); (3) December 10, 2004 for the 2004
13 12 Day Pre-General Report (48-Hour Notices); (4) December 29, 2004 for the 2004 30 Day Post-
14 General Report (24-Hour Notices); and (5) June 8, 2005 for the amended 2004 12 Day Pre-
15 General Report (48-Hour Notices). Thus, Respondents were on notice from RFAI's that they
16 were not timely filing independent expenditure notices, but did not "change their practice
17 immediately." As a result, a significant number of independent expenditures notices were filed
18 not only late, but after the elections to which they pertained.

19 **E. Conclusion**

20 As set forth above, Respondents have admitted they violated the campaign finance laws,
21 and none of the proffered arguments, given the full evidentiary record, excuse or mitigate their
22 violations. Accordingly, we recommend that the Commission find probable cause to believe that
23 the National Right to Life PAC and Carole Tobias, in her official capacity as treasurer, violated

1 2 U.S.C. § 434(g).

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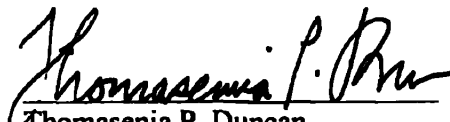
III. RECOMMENDATIONS

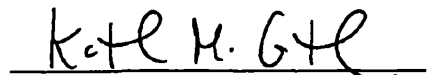
1. Find probable cause to believe that National Right to Life Political Action Committee and Carol Tobias, in her official capacity as treasurer, ("Respondents") violated 2 U.S.C. § 434(g);

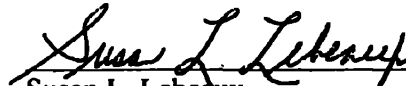
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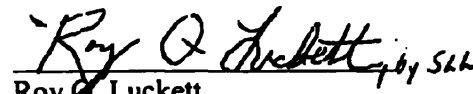
3. Approve the appropriate letter.

12-7-09
Date


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